Summer 2009

Vol. 26, No. 3

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Illinois Public Employee Relations
>> REPORT
Summer 2009 • Volume 26, Number 3

Recent and Potentially Forthcoming Developments in Federal Regulation of the Workplace

By J. Stuart Garbutt

I. Introduction

Now is a particularly apt time to review and take stock of recent and possibly looming changes in federal workplace regulations. With a change of administrations in Washington, particularly one involving a change in the party in power, often come changes, or at least the anticipation of changes, in labor and employment law. This year has been no exception. The current economic crisis has given new impetus to proposals to modify regulations affecting the labor market and the rights of stakeholders in that market. As a result, there have been several significant changes in the last twelve months, with others yet anticipated, even beyond much-discussed proposals to change the National Labor Relations Act, which subject is beyond the scope of this article.

Amendments to the Americans with Disabilities Act (ADA)[1], and to the Family and Medical Leave Act (FMLA)[2] and FMLA regulations[3] were adopted in late-2008, but are still being absorbed by employers and employee organizations. Important changes to several federal antidiscrimination laws in the form of the "Lilly Ledbetter Fair Pay Act,"[4] and to employees' COBRA rights as part of the federal economic "stimulus" package,[5] were signed into law in early-2009. Still other measures are pending in Congress or with federal agencies amid expectations that proposals may soon be adopted, because they appear to enjoy the support of the new administration. This article will review some these recent and pending changes and consider how these changes may impact the workplace, particularly for public employers and employees in Illinois.

II. Amendments to the ADA

The ADA Amendments Act of 2008,[6] effective January 1, 2009, substantially revised the definition of "disability" to overrule certain court decisions that were seen as having unduly limited the ADA's scope. From its inception, the ADA has protected qualified individuals who have "a physical or mental impairment that substantially limits one or more major life activities of such individual," individuals who have "a record of such an impairment," and those who are "regarded as having such an impairment."[7] In 2002, however, in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*,[8] the Supreme Court ruled that the terms "substantially limits" and "major life activities" should be interpreted strictly to create a "demanding standard" for qualifying as disabled.[9] The ADA Amendments thoroughly countermand that judicial directive, requiring instead that the "definition of disability be construed in favor of broad coverage of individuals ... to the maximum extent permitted by the terms" of the Act.[10]

A. When Is An Impairment "Substantially Limit[ing]"?

Supreme Court interpretations before the ADA Amendments indicated that an individual's impairment had to "prevent or severely restrict" the individual's performance of "major life activities" to be protected by the ADA.[11] According to the Court, the individual had to be "presently – not potentially or hypothetically – substantially limited."[12] Finally, the Court held that the availability of "mitigating measures" could deprive an otherwise qualifying impairment of protection, since an impairment "corrected by mitigating measures does not substantially limit."[13] The Supreme Court even held that an otherwise qualifying disability could be rendered non-disabling not only by external "mitigating measurers like artificial aids," but also by "measures undertaken, whether consciously or not, within the body's own systems."[14] That is, where a person's body naturally adapts to or otherwise compensates for an impairment, the person might not be deemed substantially limited in a major life activity.

In the ADA Amendments Act,

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Congress unambiguously rejected these Supreme Court interpretations.[15] Rather than substitute new statutory language elucidating the "substantially limits" requirement, Congress left it to the Equal Employment Opportunity Commission (EEOC) to "revise that portion of current [ADA] regulations that defines the term 'substantially limits' as 'significantly restricted.'"[16] Further, the Amendments commanded that the determination of whether a condition "substantially limits" an individual henceforth should "be made without regard to the ameliorative effects of mitigating measures."[17] The Amendments specify mitigating measures that should not be considered, including medications, medical supplies, prosthetic limbs, low-vision devices, mobility devices, and oxygen therapy equipment, as well as such natural mitigating measures as "learned behavioral or adaptive neurological modifications."[18] The Amendments make clear that whether an individual happens to be presently in good health does not matter; rather, "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[19]

B. What is A "Major Life Activity"

The ADA Amendments also overturn a Supreme Court interpretation[20] that the term "major life activities" means only those activities that are of "central importance to most people's daily lives."[21] The Amendments broaden the term by setting forth a more comprehensive list of illustrative human activities, both volitional and non-volitional. The list includes: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, as well as non-volitional bodily functions, including the immune system, normal cell growth, digestive system, bowels, bladder, neurological system, brain, respiratory system, circulatory system, endocrine system, and reproductive system.[22] The Amendments reaffirm that an impairment need only limit a single major life activity to be considered a disability.[23]

Although the ADA Amendments significantly expand what constitutes a major life activity, some relatively routine activities evidently still do not qualify. For example, several courts have held that an impairment does not constitute a protected "disability" merely because it limits an individual's ability to operate a motor vehicle, reasoning that driving a car is not a major life activity, at least in urban areas where public transportation is available.[24] The Seventh Circuit, while deciding a case that arose under the pre-amendment ADA, recently suggested that even the broader list of major life activities in the ADA Amendments supports this view.[25]

Also noticeably absent from the ADA Amendments is any discussion or clarification of the so-called "single-job rule," under which it has been held that, for an individual to be substantially limited in the major life activity of "working," the individual must be precluded from a broad class or range of jobs instead of merely one job or type of job.[26] Evidently the single-job rule survives the Amendments.

C. "Regarded As" Disabled

The ADA long has protected non-disabled persons who incorrectly are "regarded as" having a disability. Previously, however, to satisfy the "regarded as" prong, an individual had to be wrongly perceived as having an impairment that would qualify as a disability by *substantially* limiting performance of a *major life activity*.[27]

The ADA Amendments change this as well. The Amendments prescribe that an individual now is "regarded as" disabled if the individual is subjected to discrimination based on an "actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*."[28] Thus, in effect, an individual now may qualify for protection under the ADA's "regarded as" provision more easily than one who claims to be actually disabled. The "regarded as" individual must merely demonstrate that an employer perceived him or her to have *an impairment*, and discriminated because of it; the individual need not show that the perceived impairment would limit a major life activity, as long as what the employer perceives is not a mere transitory impairment.[29] A "transitory" impairment is "an impairment with an actual or expected duration of 6 months or less."[30]

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D. Practical Significance of the ADA Amendments

The Amendments substantially liberalize the ADA so as to make it less likely for an individual to be denied legal protection because his or her condition seems insufficiently limiting or too-readily ameliorated. One likely practical result is that employers and labor organizations charged with ADA violations will be less successful in avoiding ADA trials through motions for summary judgment. The Amendments probably make it more difficult for a court to conclude, without a trial, that the nature of an individual's physical or mental impairment falls clearly short of what is required for statutory protection.

This is significant mainly as a matter of litigation strategy. Being able to avoid trial through summary judgment has obvious value to ADA defendants, once they are defendants. But most employers and unions prefer to avoid lawsuits in the first place. Therefore, in their daily activities, potential defendants should focus less on whether an individual can show that he or she is substantially limited in a major life activity, and more on whether the individual's impairment interferes with job performance and, if so, whether it can be reasonably accommodated.

This is especially true in Illinois, particularly in the public sector, where claims of disability discrimination in employment may, and for 11th Amendment reasons sometimes must, be litigated under the Illinois Human Rights Act (IHRA).[31] Under the IHRA, whether an individual's physical or mental impairment substantially limits a major life activity is largely irrelevant since the IHRA protects disabled individuals against discrimination without resorting to those terms. An individual is protected under the IHRA if he or she has a non-transitory "determinable physical or mental characteristic," whether congenital or as a result of an injury or disease, which is unrelated to the individual's ability to perform the job.[32] Also, effective January 2008, claims under the IHRA are triable in Illinois courts,[33] which generally are considered disinclined to grant summary judgment.

III. Revisions to the Family and Medical Leave Act and Rules

The Family and Medical Leave Act (FMLA) was amended by the National Defense Authorization Act of 2008[34] to allow eligible employees of covered employers to take new and additional kinds of FMLA leave. The amendments provide for FMLA leave because of a "qualifying exigency" that involves an employee's spouse, child, parent or next of kin being called to, or serving in, the Armed Forces. In addition, the amendments provide for FMLA leave for an employee to care for a covered Armed Forces member who becomes ill or incurs an injury while on active military duty.

In November 2008, the U.S. Department of Labor (DOL) promulgated new FMLA regulations[35]which implement these military-related leave provisions and overhaul provisions of the regulations that govern traditional FMLA leaves. The revised regulations make several significant changes to what many view as an already complex regulatory scheme, although the DOL describes some of the changes as intended merely to clarify or simplify the original rules. This section will first discuss the new military-related leave provisions, and then some of the other changes wrought by the regulatory overhaul.

A. Military Caregiver Leave

The FMLA Amendments allow eligible employees up to 26 workweeks of leave, during a 12-month period, to care for certain family members who become ill or injured in the Armed Forces.[36] However, such an employee is entitled to no more than a *combined total* of 26 weeks of FMLA leave for *all* FMLA-qualifying reasons, including the employee's care of the servicemember and any other FMLA leave the employee may take for his/her own serious health condition, or the birth or adoption of a child, or to care for a non-service-member spouse or parent or child, or for "qualified exigency" leave during that 12-month period.[37]

This can get complicated. The FMLA Amendments allow an eligible employee to take up to 26 weeks of leave in a unique 12-month period to care for one covered servicemember, and then take up to *another* 26 weeks of leave – *starting another* 12-month period – to care for a different covered servicemember, or even for the same servicemember with a different injury or illness. Obviously, these 12-month periods during which one employee may be caring for multiple covered servicemembers can overlap. That is, at any particular moment an employer may have to keep track of a single employee's use of FMLA leave according to several different 12-month periods. As discussed below, the possibly multiple 12-month periods triggered by an employee's use of military-caregiving leaves can be different from the 12-month period in which the employer already may have been monitoring that employee's use of traditional FMLA leave.

Apart from possible confusion concerning these 12-month measuring periods, the factors governing eligibility for military-caregiver leave are comparable to the factors governing eligibility for traditional FMLA leave. The employee must be the spouse, daughter, son, parent or next of kin of the covered servicemember.[38] The term "covered servicemember" includes members of the Armed

Forces, including members of the National Guard or Reserves, if the member has incurred a serious injury or illness for which he or she is undergoing medical treatment or therapy, is in outpatient status, is in recuperation, or is on the military's temporary disability retired list.[39] A "serious injury or illness" must be one that was incurred in the line of duty while the servicemember was on active duty, and that could render the servicemember medically unfit to perform his or her duties.[40]

As indicated, the 12-month period during which an eligible employee may take up to 26 weeks of FMLA leave to care for a covered servicemember begins on the first day the employee takes such leave for a particular covered servicemember's injury or illness and ends 12 months later.[41] As stated, however, an eligible employee may take up to another 26 weeks of such military-caregiver leave to care for another covered servicemember, or to care for the same covered servicemember if he or she incurs a subsequent serious injury or illness. In that event, the first day of that subsequent caregiver leave starts a separate 12-month period in which that additional 26 weeks of leave may be taken, even if the second 12-month period thus commences before the first 12-month period has elapsed.[42]

Thus, an initial difference with military caregiver leave is that an employer has no option to select the 12-month period in which to calculate an employee's use of military-caregiver leave as it may for other types of FMLA leave.[43] In addition, it clearly is possible for a single employee to be subject to multiple overlapping 12-month periods during which the employee is entitled to use FMLA leave for different purposes. It is not clear whether an employee who has taken non-military-caregiver FMLA leave shortly before beginning a qualifying military-caregiver leave continues to be subject, after commencing the military-caregiver leave, to the separate 12-month period that governed the employee's use of the non-military-caregiver leave. The revised regulations state that, within the "single 12-month period" that commences with an eligible employee's first use of military-caregiver leave, "the employee is entitled to no more than 12 weeks of leave" for traditional FMLA reasons and qualifying military exigencies, so that such an employee may, for example, "during the 'single 12-month period,' take 16 weeks of FMLA leave to care for a covered servicemember and 10 weeks of FMLA leave to care for a newborn child."[44] Assume, however, that this hypothetical employee used three weeks of FMLA leave due to the employee's own serious health condition in January, before beginning his 16 weeks of covered servicemember leave in March. After the employee completes the 16 weeks of covered servicemember leave that June, is he still eligible for another 10 weeks of FMLA leave to care for his newborn starting in July, as the new regulation indicates? Considering the employee as eligible for another ten weeks of FMLA leave will mean that the employee takes a total of no more than 26 weeks *during the period beginning in March*. However, it could mean a total of 13 weeks of traditional FMLA leave during the 12 months that commenced with the employee's initial personal illness leave in January.

B. Qualifying Exigency Leave

The FMLA Amendments also authorize an eligible employee to take up to 12 weeks of FMLA leave for certain other military-related exigencies that arise out of the fact that a spouse, son, daughter, or parent of the employee is on, or is called to, active military duty.[45] The revised FMLA Regulations specify that "qualifying exigencies" for this kind of leave include:

(1) Short-notice deployment.
(2) Military events and related activities.
(3) Childcare and school activities.
(4) Financial and legal arrangements.
(5) Counseling.
(6) Rest and recuperation.
(7) Post-deployment activities.
(8) Additional activities.[46]

Unlike military caregiver leaves discussed above, the 12-month period for "qualifying exigency" leave seems to be the same as the 12-month period governing leave taken for "traditional," non-military-related FMLA reasons.

C. Other FMLA Rule Changes

The revised FMLA Regulations incorporate numerous other changes, representing a substantial overhaul of the initial rules. Some of the revisions also may be significant.

For example, the revised Regulations delete language that had been interpreted to provide that an eligible employee encountering an immediate and unforeseeable need for FMLA leave could not be required to notify his employer of the FMLA-qualifying reasons for his absence sooner than two business days after the fact.[47] The revised Regulations continue to state that such an employee must notify the employer "as soon as practicable"[48] but, instead of indicating that this "ordinarily would mean ... within one or two business days," now provide that "it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day."[49] The DOL's Preamble to the final revised Regulations indicates that this change is intended to allow employers to enforce their normal employee call-in requirements except where unusual circumstances prevent an FMLA-qualified individual from complying.[50] Subsequently, the DOL has rescinded its

1999 opinion letter, which seemed to assure an employee of up to two business days to notify his employer of the FMLA reasons for his absence,[51] and substituted a new opinion letter, which states:

> [I]n the example . . . of an employer policy requiring employees to call in one hour prior to their shift to report absences and an employee who is absent on Tuesday and Wednesday, but does not call in on either day and instead provides notice of his need for FMLA leave when he returns to work on Thursday, it is our opinion that unless unusual circumstances prevented the employee from providing notice consistent with the employer's policy, the employer may deny FMLA leave for the absence.[52]

The revised FMLA Regulations also modify a provision that previously forbade an employer to contact an employee's healthcare provider to clarify an FMLA medical certification that the provider completed, except with the employee's express permission and through another healthcare provider representing the employer.[53] The revised rule now permits an employer, through a human resources representative or other management official who is not the employee's direct supervisor, to contact the employee's healthcare provider for such a clarification regardless of the employee's authorization, as long as the employer first gives the employee seven days to cure the confusion or lack of clarity in the certification.[54]

The revised FMLA Regulations also now permit an employer to apply to FMLA leaves the employer's policies regarding the minimum increments in which employees may use leave time, as long as the minimum increment is no more than one hour.[55] Thus, for example, if an employer allows sick leave to be used in increments of no less than 30 minutes, and an employee reports to work 20 minutes late for an FMLA-qualifying reason, the employer may give the employee the choice to wait until 30 minutes after his or her normal start time before commencing work, and thus to use 30 minutes of FMLA leave, or else to forgo FMLA protection for the lateness. However, the employer may not charge the employee with the use of 30 minutes of FMLA leave if the employee actually works during any of that time.[56]

The revised Regulations also clarify some matters involving the interplay between FMLA leave and employees' use of "light duty" work. First, the Regulations make clear that the time an injured employee spends in a light-duty position cannot be counted against the employee's FMLA entitlement, since while doing "light duty" work the employee is not on leave.[57] On the other hand, an employee who returns from an FMLA leave in a temporary light-duty capacity retains the FMLA right to return to the employee's regular job when the employee is able to accept full-duty work again, as long as the employee's ability to return to the regular job occurs no more than a year after the employee began the FMLA leave.[58]

Finally, the revised FMLA Regulations prescribe new notice forms that employers may use to fulfill their duty to timely inform employees of their FMLA rights, whether they are eligible for requested FMLA leave, what their rights and responsibilities are in connection with an FMLA leave, and whether the employer is treating a particular absence as FMLA leave.[59] In addition, the revised Regulations prescribe new medical certification forms, one for use in connection with leave for an employee's own serious health condition and another for use in connection with leave to care for an ill family member.[60]

D. Practical Significance of These FMLA Changes

Employers and labor organizations must become familiar with the new bases for FMLA leave – military exigency and military caregiver situations – established in the 2008 FMLA Amendments. They also should analyze how the new leave provisions may affect their existing labor agreements, if any. Employers also must prepare for the administrative problems that may be posed by needing to keep track of employees' FMLA usage according to different, and possibly conflicting, 12-month periods.

The revised FMLA regulations also should be studied for how they may affect efforts to fairly and effectively enforce attendance, paid time off and other leave policies without running afoul of the FMLA. Employers should make use of the new notice and medical certification forms. Finally, the ability to require employee compliance with proper call-in policies and on the increments of leave used, and the ability to more readily obtain clarification of confusing or incomplete medical certificates, may help employers in policing absence abuse or the misuse of leave.

IV. The Ledbetter Fair Pay Act

On January 29, 2009, the Lilly Ledbetter Fair Pay Act of 2009 ("Fair Pay Act") became law, in one of the first bill signings by the then-new Obama Administration.[61] Representing a Congressional reaction to the U.S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,[62] the Fair Pay Act makes a significant change affecting the timeliness of claims that allege pay and benefits-related discrimination under Title VII of the Civil Rights Act of 1964,[63] the Age Discrimination in Employment Act of 1967,[64] the Americans with Disabilities Act of 1990,[65] and the Rehabilitation Act of 1973.[66] In the *Ledbetter* case, the Court upheld the dismissal of a plaintiff's complaint of wage discrimination because the wage disparities the plaintiff complained about stemmed

from allegedly discriminatory performance ratings that the plaintiff had received years earlier, well outside the 300-day period in which Title VII requires EEOC charges to be filed.[67]

A. Impact on Limitations Periods for Discrimination Claims

The Fair Pay Act provides that the EEOC charge-filing periods under Title VII, the ADA and the ADEA begin to run not only when an allegedly discriminatory pay-setting decision (like the performance appraisals in the *Ledbetter* case) is made, but also on each subsequent date when an individual is affected by an application of such a decision. In other words, the statute of limitations continually restarts and does not toll. The Fair Pay Act accomplishes this by inserting the following provision into each of the affected statutes:

> [A]n unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid, resulting in whole or part from such a decision or other practice.[68]

The Fair Pay Act also makes that change retroactive, to cover claims that were pending on or after May 28, 2007.[69] Although the Act thus allows claims to be based on decisions occurring years before an EEOC charge is filed, it retains the statutory provisions limiting potential backpay to the period beginning no more than two years before a Title VII or ADA charge was filed.[70] For ADEA cases, backpay remains limited to a period beginning two or three years before suit is filed.[71]

The wording of the Fair Pay Act, providing that a new "unlawful practice" occurs each time an individual is affected by "a discriminatory compensation decision *or other practice*," has given rise to concerns that the Act may eviscerate the statute of limitations not just for pay discrimination claims, but more broadly for claims involving "other practices" that could go well beyond pay and benefit matters. The case law will determine to what extent those concerns are well-founded, and hopefully will flesh out how far the Fair Pay Act actually goes in permitting present-day claims that turn on events from long ago. Limited guidance may be provided by a few early decisions.

For example, in *Goodlett v. State of Delaware*, the court reasoned that an employee's allegations, "that [he] and other Black employees [were] systematically paid less than similarly-situated White employees" as a result of annual pay-setting decisions that Delaware had made starting years earlier, represented the very sort of claim that the Fair Pay Act sought to make actionable with every effected paycheck.[72] Thus, the court held that "Goodlett's pay disparity claim survives to the extent it relates to the period of 300 days prior to his EEOC filing."[73]

On the other hand, in *Richards v. Johnson & Johnson, Inc.*,[74] a court held that a series of uncomplimentary annual performance appraisals that the plaintiff received beginning in the year 2000, and which allegedly impaired his ability to secure subsequent promotions within the company, were not actionable under his September 2007 EEOC charge. The court noted that, in *National Railroad Passenger Corp. v. Morgan*, the Supreme Court ruled that Title VII bars litigation over "discrete acts of discrimination or retaliation" like hirings, firings and promotions "that occur outside the statutory [300-day charge-filing] period."[75] The *Richards* court then observed:

> While the [Fair Pay] Act certainly contains expansive language in superseding the holding in *Ledbetter v. Goodyear Tire & Rubber Co.*, it does not purport to overturn *Morgan*, and thus does not save otherwise untimely claims outside the discriminatory compensation context.[76]

In *Gentry v. Jackson State University*,[77] a court reached a conclusion apparently inconsistent with *Richards*. The plaintiff in *Gentry* filed an EEOC charge in 2006 complaining about the University's 2004 decision to deny the plaintiff tenure, which also denied her a salary increase.[78] Although it might appear that the University's tenure decision in Gentry's case represented a "discrete act" akin to one of the promotion decisions in *Richards*, the *Gentry* court reasoned that "the denial of tenure, which plaintiff has contended negatively affected her compensation, qualifies as a 'compensation decision' or 'other practice' affecting compensation within the . . . Fair Pay Act."[79] The court therefore denied the University's motion for summary judgment.[80]

Even where the Fair Pay Act permits litigation over pay-setting decisions or other pay-affecting events which may have occurred long before the filing of an EEOC charge, plaintiffs must prove that those long-ago decisions or events were discriminatory. The significance of that burden is illustrated by the decision in *Bush v. Orange County Corrections Department*,[81] in which female correctional officers complained of current pay discrepancies allegedly resulting from events that occurred some 16 years earlier when they suffered wage reductions on transferring from nursing positions. Although the court held that the *Bush* plaintiffs' claims were saved by the Fair Pay Act from being untimely, the court nevertheless

awarded summary judgment to the employer, because the plaintiffs lacked evidence that the pay adjustments 16 years earlier actually were discriminatory.[82]

B. Practical Significance of the Fair Pay Act

By permitting discriminatory pay and benefit claims under federal anti-discrimination statutes to harken back indefinitely to long-ago events allegedly giving rise to the complained-of current pay disparities, the Fair Pay Act makes it critical for employers and labor organizations to ensure the propriety of their decisions affecting pay and benefits when those decisions are made. It is simply no longer the case that a possibly unfair or ill-considered decision will lose its legal significance, and become effectively immune from challenge, once 300 days has elapsed. Now, a party may be called upon to defend actions that occurred years earlier if those actions can be said to affect compensation or benefit amounts paid today or within the past 300 days. Accordingly, employers and unions should review their collective bargaining agreements and pay practices to ensure that existing practices are fair and unbiased, and to analyze what adjustments might be in order if the procedures or their results seem problematic. Wherever compensation is affected by employee performance appraisals or other supervisory assessments of employees' talents and career prospects, employers must ensure proper oversight of that decision-making and redouble measures to train supervisors in, and hold them accountable for, unbiased and defensible assessments. Much more is at stake in these situations in the wake of the Fair Pay Act. Where previously most pay discrimination claims were small cases involving relatively little money, now seemingly unfair pay-setting decisions may be unearthed long after the fact, and may lend themselves to class-wide claims of pay discrimination involving years of backpay, compensatory and punitive damages, and attorneys' fees for potentially large numbers of employees.

In addition, employers may want to at least consider undertaking scientific compensation or "pay equity" audits, to analyze whether current compensation patterns among employees might be said to reflect possible unlawful discrimination originating years ago. Undertaking such an audit poses risks for an employer, since even if measures are taken to allow the audit to be treated as privileged, the audit results eventually may be used against the employer. But on the other side of the scale, once an apparent pay disparity is rectified, thereby bringing to an end the distribution of potentially problematic paychecks, the 300-day limitations period for filing an EEOC charge will finally begin to run, insulating the disparity from challenge ten months after the date of the last possibly infected paycheck.

V. 2009 Cobra Subsidies

As part of the federal "Stimulus Package" to bolster or restart the U.S. economy, the American Recovery and Reinvestment Act of 2009[83] ("ARRA") effected a temporary reduction in the amount of the premiums that eligible individuals can be required to pay for what is commonly called "COBRA" continuation coverage of employer-provided group health insurance. The COBRA premium reduction applies to group health plans sponsored by state and local government employers subject to the Public Health Service Act as well as to the ERISA plans of private sector employers.[84] The full subsidy applies in favor of taxpayers having modified adjusted gross incomes of up to $125,000 (or $250,000 for joint tax filers) and in reduced amounts for taxpayers whose modified adjusted gross incomes are between $125,000 and $145,000 ($250,000 to $290,000 for joint filers).[85] Qualifying individuals are eligible for the premium reduction if their COBRA rights were or are triggered by a covered employee's involuntary termination of employment between September 1, 2008 and December 31, 2009.[86] In such a case the premium reduction is accomplished by requiring the employer to pay only 35 percent of what the individual's COBRA premium otherwise would be, for up to nine months.[87]

Effective April 6, 2009, the U.S. Department of Labor (DOL) published an extensive guidance for employers concerning the COBRA premium reduction program, available on the DOL website.[88] (,"DOL Guidance"). The DOL Guidance explains the specific notices that health plans are required to give qualified beneficiaries (a general notice to eligible individuals who experience a qualifying COBRA event during the applicable period, and a notice of an extended COBRA election period to eligible individuals who had a qualifying event on or after September 1, 2008 but before the ARRA became effective in February 2009).[89] The DOL has developed model forms for those notices.[90] The DOL Guidance also addresses how to handle any overpayments of COBRA payments that qualified beneficiaries may make, and the appeal rights that employees have if their employers find them ineligible or otherwise deny their requests for premium reductions.[91]

Some challenging questions may arise in connection with the COBRA premium reduction program. For example, an Internal Revenue Service guidance (Notice 2009-27)[92] addresses questions concerning what constitutes an "involuntary termination" making an employee eligible for the premium subsidy, explaining that the term includes not only garden-variety

discharges but also an employer's failure to renew an individual's contract, as well as an individual's election to terminate employment for good reason because of the employer's material negative change in the employee's circumstances.[93] However, according to the IRS guidance, an "involuntary termination" does not occur merely because an employee becomes unable to work due to a disability, unless the employer terminates his or her employment for that reason.[94] An employee's voluntary election to quit, pursuant to an employer's offer of a severance or buy-out package, may qualify as an "involuntary termination" if the employer indicates, when making the severance offer, that a certain number of employees will be terminated if insufficient numbers accept the separation package.[95]

The IRS guidance also indicates that the 35 percent premium subsidy applies to whatever COBRA premium amount an employee otherwise would be required to pay, even if, pursuant to a pre-existing policy or a special severance offer, the employer already subsidizes some of the premium.[96] Thus, for example, if an employer independently offers to pay 60 percent of the COBRA premium for an employee who accepts a separation package, the ARRA premium reduction applies to the remaining 40 percent that the employee otherwise would have to pay, meaning that the 40 percent portion must be subsidized by 35 percent, leaving the employee to pay only 26 percent of the unreduced COBRA premium for the nine months of the ARRA subsidy period.[97]

VI. Paycheck Fairness Act

A federal measure that has not yet passed Congress, but which has momentum and has been described as a rightful companion to the Ledbetter Fair Pay Act, is the similarly-titled "Paycheck Fairness Act."[98] Pending in Congress as S. 182 and H.R. 12, the Paycheck Fairness Act would amend the Equal Pay Act of 1963[99] which, although administered by the EEOC, was left unaffected by the Fair Pay Act. The Equal Pay Act forbids covered employers, including covered public employers, to pay unequal wages to male as compared to female employees who perform substantially equal work in the same establishment.[100]

Unlike the Ledbetter Fair Pay Act, the Paycheck Fairness Act would not expressly alter the limitations period for Equal Pay Act claims, or provide that such claims arise anew with each paycheck,[101] although such an approach may be inherent in the Equal Pay Act in any event. What the Paycheck Fairness Act will do, if enacted, is revise the damages available in Equal Pay Act cases (currently confined to back wages for two or three years, possibly doubled as liquidated damages, *a la* the FLSA and ADEA)[102] to also permit compensatory and punitive damage awards.[103] This would make Equal Pay Act remedies similar in kind to those available under Title VII and the ADA, except that compensatory and punitive damages currently are capped for Title VII and ADA claims, with the caps based on the size of the employer,[104] whereas the Paycheck Fairness Act, in its present form at least, includes no such caps.[105] The Paycheck Fairness Act also would modify the Equal Pay Act to allow "opt-out" class actions under Federal Rule of Civil Procedure 23,[106] instead of only allowing "opt-in" collective actions of the type now permitted in ADEA and FLSA cases.[107]

It remains to be seen whether the Paycheck Fairness Act will follow the Ledbetter Fair Pay Act and the other changes discussed above, to become law in the near term as its proponents seek. Because the real impact of the Paycheck Fairness Act concerns only available remedies, rather than matters of substance, its prospects may have relatively little significance. After all, Title VII already forbids pay discrimination based on sex and allows the sorts of remedies and class actions that the Paycheck Fairness Act would authorize. Employers may take some comfort in the limited practical significance of the Paycheck Fairness Act. In light of the other developments highlighted above, however, employers have plenty of substantive federal regulatory changes to digest as it is. ♦

Notes

1. ADA Amendments Act of 2008, Pub. L. No. 110-325, 42 U.S.C. §§ 12101-12213.
2. 29 U.S.C. § 2601-54.
3. 29 CFR Part 825.
4. Pub. L. No 111-2 (1989).
5. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009).
6. Pub. L. 110-325.
7. 42 U.S.C. § 12102(1).
8. 534 U.S. 184 (2002).
9. *Id*. at 197 (2002).
10. 42 U.S.C. § 12102(4)(A).
11. *See Toyota Motor Mfg*., 534 U.S. at 198.
12. *Sutton v. United Air Lines, Inc*., 527 U.S. 471, 482 (1999).
13. *Id*. at 482-83.
14. *Albertson's, Inc. v. Kirkingburg*, 257 U.S. 555, 565-66 (1999).
15. Pub. L. 110-325, § 2(b)(4).
16. *Id*. § 2(b)(6).
17. *Id*. § 4(a).
18. *Id*.
19. *Id*. (emphasis added).
20. *Toyota Motor Mfg*., 534 U.S. at 198.
21. Pub. L. 110-325 at § 4(a)
22. Pub. L. 110-325 at § 2(b).
23. *Id*.
24. *See, Winsley v. Cook County*, 563 F.3d 598, 603-04 (7th Cir. 2009); *Kellogg v. Energy Safety Servs. Inc*., 544 F.3d 1121, 1126 (10th Cir. 2008); *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329-30 (11th Cir. 2001); *Colwell v. Suffolk County Police Dept*., 158 F.3d 635, 643 (2d Cir. 1998).
25. *Winsley v. Cook County*, *supra at* n.2.
26. *See Sutton v. United Air Lines, Inc*., 527 U.S. at 492.
27. *Id*. at 489.
28. Pub. L. 110-325, § 4(a), 42 U.S.C. § 12102(3)(A) (emphasis added).
29. *Id*.
30. *Id*.
31. 775 ILCS 5/1-101, *et seq*,.
32. 775 ILCS 5/1-103(I).
33. *See* 2007 Ill. Laws 2474, 2480, 2491.
34. Pub. L. No. 110-181, § 585, 122 Stat. 3, 8 (2008).
35. 73 Fed. Reg. 67,934, 67,953 (Nov. 17, 2008) (codified at 29 C.F.R. § 825.124).
36. 29 U.S.C. § 2612(a)(3).
37. 29 U.S.C. § 2612(a)(4).
38. *Id*. § 2612(a)(3).
39. *Id*. § 2611(16).
40. *Id*. § 2611(19).
41. 29 C.F.R. § 825.127(c)(1) (2009).
42. 29 C.F.R. § 825.127(c)(2) (2009).

43. *See id*. § 825.200(b).
44. *Id*. § 825.127(c)(3) (quotation in original).
45. 29 U.S.C. § 2612(a)(1)(E).
46. 29 CFR § 825.126(a).
47. *See* DOL Wage & Hour Op. Ltr. FMLA-101 (Jan. 15, 1999).
48. 29 C.F.R. § 825.302(a) (2009).
49. *Id*. § 825.302(b).
50. 73 Fed. Reg. 67934, 68009 (Nov. 17, 2008).
51. DOL Wage & Hour Op. Ltr. FMLA-101 (Jan. 15, 1999).
52. DOL Wage & Hour Op. Ltr. FMLA 2009-1-A (Jan. 6, 2009).
53. Previous 29 C.F.R. § 825.307(a) available at 60 Fed. Reg. 2180, 2259 (Jan. 6, 1995).
54. 29 C.F.R. § 825.307(a) (2009).
55. *Id*. § 825.205(a).
56. *Id*.
57. *Id*. § 825.220(d).
58. *Id*.
59. 29 C.F.R. § 825.300(a)-(d); DOL Form WH-381, 382 (2009).
60. 29 C.F.R. § 825.306-307; DOL Form WH-380-E, 380-F (2009).
61. Pub. L. No. 111-2 (2009).
62. 550 U.S. 618 (2007).
63. 42 U.S.C. §§ 2000e-5(e).
64. 29 U.S.C. § 626(d).
65. 42 U.S.C. §§12111-12117, 12203.
66. 29 U.S.C. §§791, 794.
67. 550 U.S. 618.
68. Pub. L. No. 111-2 §§3-5.
69. Pub. L. No. 111-2 §6. (May 28, 2007 was the day before the Supreme Court decided the *Ledbetter* case).
70. Pub. L. No. 111-12 §3; see 42 U.S.C. §§ 2000e-5(e)(3)(B).
71. *See* 29 U.S.C. §§ 626(b), 216(b), 255(a).
72. Civ. No. 08-298-LPS, 2009 WL 585451, at *4 (D. Del. March 6, 2009).
73. *Goodlett*, 2009 WL 585451 at *10.
74. No. 05-3663, 2009 WL 1562952, at *9 (D. N.J. June 2, 2009).
75. *Richards*, 209 WL 585451 at *9, citing *Morgan*, 536 U.S. 101, 105 (2002).
76. *Richard*, 2009 WL 1562952 at *17 (citing *Leach v. Boylar College of Medicine*, 2009 U.S. Dist. LEXIS 11845, at *50-51 (S.D. Tex. Feb. 17, 2009); *Rowland v. Certainteed Corp*., 2009 U.S. Dist. LEXIS 43706 at *15-19 (E.D. Pa. May 21, 2009); and *Vuong v. New York Life Ins. Co*., 2009 WL 306391, at *7-9 (S.D. N.Y. Feb. 6, 2009).
77. 610 F.Supp.2d 564 (E.D. Miss. Apr. 17, 2009); 2009 WL 1562952.
78. 610 F.Supp.2d at 565-566.
79. *Id*. at 566.
80. *Id*. at 569.
81. 597 F. Supp. 2d 1293, 1295 (M.D. Fla. Feb. 2, 2009).
82. *Id*. at 1296.
83. Pub. L. No. 111-5 § 3001, 123 Stat. 115, 455-466 (Feb. 17, 2009); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. No. 99-272, 100 Stat. 82 (1986)("COBRA").
84. Pub. L. 111-5, § 3001(a)(10)(B), 123 Stat. 460-461; Public Health Service Act, ch. 373, 58 Stat. 682 (1944)(codified as amended at 42 U.S.C. §§ 201-300 (2008)); Employee Retirement Income Security Act of 1974, Pub.L. 93-406, 88 Stat. 829 (1974)(codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.)).
85. American Recovery and Reinvestment Act of 2009 § 3001 (b)(1)(B).
86. *Id*. at § 3001(a)(3).
87. *Id*. at.§§ 3001(a)(1)(A), 3002(a)(2)(A).
88. U.S. Department of Labor, Employee Benefits Security Administration, FAQ for Employers About COBRA Premium Reduction Under ARRA <http://www.dol.gov/ebsa/faqs/faq-cobra-premium reductioner.html> (last visited August 6, 2009).
89. *Id*. at Q6.
90. *Id*. at Q8.
91. *Id*. at Q12, Q13.
92. I.R.S. Notice 2009-27, *available at* <http://www.irs.gov/pub/irs-drop/n-09-27.pdf>.
93. *Id*. at 5.
94. *Id*. at 5-6.
95. *Id*. at 7.
96. *Id*. at 11.
97. *Id*.
98. Fair Pay Act, Pub.L. 111-2, 123 Stat. 5; Paycheck Fairness Act, S. 182, 111 Cong. (2009); *see also* Paycheck Fairness Act, H.R. 12, 111 Cong. (2009).
99. Equal Pay Act, 29 U.S.C. § 206(d) (2008).
100. *Id*.
101. S. 182 and H.R. 12.
102. *See* 29 U.S.C. § 216(b) (providing for double backpay as liquidated damages under the FLSA); also 29 U.S.C. § 626(b) (providing for liquidated damages under the ADEA).
103. 42 U.S.C. § 1981a (b)(3) (2008) (limiting compensatory and punitive damage awards under Title VII and ADA).
104. *Id*.
105. S. 182 and H.R. 12.
106. FED. R. CIV. P. 23.
107. See 29 U.S.C. § 216(b) (stating "no employee shall be a party plaintiff to any such action unless he gives his consent in writing . . . filed in the court in which such action is brought.") ♦

Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes and the equal employment opportunity laws.

IELRA Developments

Duty to Bargain

In *Southwest Suburban Federation of Teachers, AFT Local 943, IFT, AFL-CIO v. Thornton Fractional Township High School District 215*, Case No. 2008-CA-0003-C (IELRB 2009), the IELRB upheld an ALJ's determination that Thornton Fractional Township High School District 215 violated Section 14(a)(5) and (1) of the IELRA by unilaterally changing the status quo of how the 12 month schedule would be awarded in the Guidance Office, without notice to or negotiation with the Southwest Suburban Federation of Teachers, AFT Local 943, IFT. The ALJ found that the the district further violated the IELRA by refusing to bargain the issue when the union raised it, and by refusing to award the 12 month position to the most senior secretary in the Guidance Office, Carmen Mureiko. In February 2005, the district announced that, due to a budget deficit, "[a]ll 12 month building secretaries will be reduced to 10 1/2 months except the principal secretary and the senior guidance secretary." When the new school year began, schedules were reduced accordingly and the 12 month schedule was retained by the senior secretary in each office.

In June 2006, the union was certified as the collective bargaining representative for most of the clerical employees; Mureiko was included in the bargaining unit and served as vice president and grievance officer for the union. In February 2007, Mureiko addressed a bargaining session focused on increasing hours for clerical workers, at which time the district refused to bargain over the issue and warned Mureiko to "be careful what she wished for."

In May 2007, Mureiko became the most senior employee in the guidance office. Mureiko was told at that time by her supervisor that she would be assigned the 12 month schedule because she was now the most senior employee. Despite this assertion, the 12 month schedule was given to the employee chosen to fill the position

held by the prior senior employee, who had less seniority than Mureiko. The issue was later raised in a bargaining meeting, at which time the district stated that Mureiko would "never" get the 12 month position. The union filed the unfair labor charge, and the ALJ found that the district had violated §§ 14(a)(5) and (1) by unilaterally changing the status quo and refusing to bargain the assignment of the 12 month schedule to a less-senior employee than Mureiko, and that the district had violated § 14(a)(3) by refusing to assign a 12-month schedule to Mureiko because of her union activity.

The district filed a timely exception to the 14(a)(5) and (1) charges, claiming that no status quo had ever been established. The IELRB, however, found that the district's written statement regarding the assignment of the 12 month schedule and its consistent past practice of assigning the 12 month schedule to the most senior secretary clearly established a status quo, which the district unilaterally changed when it assigned a 12 month schedule to a less-senior employee. The district also claimed that it had bargained the decision to assign the 12 month schedule to an employee less-senior than Mureiko. The IELRB found that, while the district had been willing to engage in discussion of the secretarial schedules generally, it refused to bargain the specific decision in question. The Board affirmed the ALJ's decision on both counts.

The district also filed a timely exception to the 14(a)(3) finding, claiming that it did not assign the 12-month schedule to a less-senior employee than Mureiko because of Mureiko's union activities. Noting that anti-union animus may be inferred, the threatening remakes made by the district during negotiations regarding Mureiko's assignment, the suspicious timing of the decision, and the district's failure to provide any justification for refusing to assign the 12 month schedule to Mureiko despite her seniority, the Board affirmed the ALJ's determination that the District acted on anti-union animus.

IPLRA Developments

Protected Activity

In *McDaniel and County of Cook/Sheriff of Cook County*, Case No. L-CA-08-048 (ILRB Local Panel, 2009), and its companion case, *Morris and County of Cook/Sheriff of Cook County*, Case No. L-CA-08-049 (ILRB Local Panel, 2009), the Local Panel upheld an ALJ's finding that the employer violated section 10(a)(1) of the IPLRA when it suspended two Correctional Officers for engaging in protected concerted activity.

On November 10, 2007, the employer ordered Correctional Officers McDaniel and Morris to transport 15 arrestees from the Markham courthouse to the Cook County Jail. One of the arrestees was infected with methicillin-resistant *Staphylococcus aureus* ("MRSA"). While in the past officers had transported MRSA-infected prisoners only after treatment and clearance from Cook County medical staff, in this case the paperwork proving the treatment and clearance was not attached to the arrestee's court order or among his personal property. Although Officer Morris reported the missing documentation to a superior, he and Officer McDaniel were nonetheless ordered to transport the infected arrestee to Jail. They refused because of the risk of contagion to other arrestees, and were each suspended without pay for 29 days.

In upholding the ALJ's finding that the employer violated section 10(a)(1), the Local Panel cited *City of Chicago and Mulligan*, 11 PERI 3008 (ILLRB 1995), which held that employees engage in protected activity when, in concert, they refuse to work under conditions they believe to be unsafe. Reviewing the record, the Panel held that the officers clearly demonstrated that their refusal to transport the arrestee was a safety-based, protected concerted activity, and that the record further demonstrated that the employer suspended the officers because of that activity. The Panel ordered the employer to cease and desist from disciplining the officers and ordered make-whole relief.

In its exceptions before the Panel, the employer argued that a safety-based refusal-to-work should be protected activity only if an employee reasonably believes obedience would result in imminent death or injury. It also urged that objective evidence should show that working conditions might reasonably be considered abnormally dangerous, that is, present some identifiable, presently existing threat to safety. While the Panel declined to follow the employer's suggestion to so limit safety-based refusals-to-work, it did so only by dismissing the employer's cited authorities as procedurally distinct and unsupportive of its position. Thus, the Panel's opinion stopped short of leaving the safety-based refusal-to-work impregnable from this line of attack.

In *Metropolitan Alliance of Police and Village of McCook*, Case No. S-CA-06-097 (ILRB State Panel, 2009), the State Panel considered whether a petition for certification filed by police officers was a motivating factor in the village's pay reduction for officer court appearances. It upheld the ALJ's dismissal of the complaint, agreeing that the union had failed to establish a causal link between the pay reduction and the petition for the certification.

In May 2005, as part of an overtime pay reduction plan, the village began examining officer-issued tickets and

instructing certain officers not to attend court if it concluded their presence was unnecessary. In July, the police chief told a sergeant that police overtime pay exceeded that of other departments, and that pay for all court appearances would be reduced by about 40 percent. In August, patrol officers and sergeants filed a representation petition with the ILRB. Shortly after the ILRB certified the union, the police chief notified the officers that the pay reduction for all court appearances was effective.

In upholding the ALJ's dismissal of the complaint, the State Panel distinguished alleged 10(a)(1) violation cases involving employer threats in response to employee protected activity from those involving employer acts. While the Panel recognized that threat cases require that the charging party show that the threat would objectively have the effect of coercing, restraining, or interfering with the exercise of protected rights to prove a 10(a)(1) violation, act cases require proof that the employer was illegally motivated in fact. In such cases, the Panel emphasized, the proper motivation analysis tracks that used in cases alleging violations of the right to engage in union activity under § 10(a)(2), where the motive requirement is satisfied only by showing that the employer's actions were prompted by the protected activity.

The Panel explained that illegal motivation could be proved circumstantially, such as through the employer's expressed hostility towards organized activities, proximity in time of the employer's action and the protected activity, and shifting explanations for the employer activity. However, the Panel invoked precedent for the proposition that timing alone, without further supporting proof, is insufficient to establish illegal motivation. Because the State Panel agreed with the ALJ's observation that the union's proof of causation depended wholly on timing, it upheld the ALJ's dismissal.

EEO Developments

Affinite Action/Disparate Impact

In *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009) the Supreme Court held that the City of New Haven, Connecticut discriminated against white and Hispanic firefighters who likely would have been promoted to lieutenant or captain but for the city's decision to avoid risking disparate impact liability, by throwing out the results of examinations it otherwise would have used in considering the promotions.

The city hired a test development company to ensure that the examination screened those applicants best qualified for senior positions. The company intentionally oversampled minorities in every stage of development to ensure that the examinations would not unintentionally favor whites. However, the great majority of the test results favored whites, and the city opted to ignore the results rather than risk disparate impact liability.

The Court found that the city had violated Title VII's disparate treatment provision when it disregarded the test results when the only evidence supporting disparate impact liability was that which would suffice to establish a *prima facie* case, that is, a threshold showing of a significant statistical disparity. If the city could have mustered more and stronger evidence of its potential disparate impact liability, intentional discrimination on the basis of race would have been justified so as to avoid the disparate impact liability.

Under Title VII's standard disparate impact proof scheme, once an alleged discriminatee has pleaded a prima facie case by showing that a facially-neutral policy or practice has a statistically-significant impact on a protected class, the employer may rebut the prima facie case by showing that the policy or practice is job-related and consistent with business necessity. If the employer is successful, the plaintiff may still prove discrimination by showing that the employer rejected a feasible available alternative policy or practice that would have had less of an adverse effect than the one chosen.

In the context of this standard of proof, *Ricci* means that in cases where an employer risks disparate impact liability, intentional protected class discrimination will be justified if the employer can show that its policy or practice is not job-related or consistent with business necessity, or that it rejected a feasible, but less discriminatory alternative. To any complaint of disparate treatment, therefore, an employer can answer that its action is directed at remedying an unintentionally discriminatory work regime. *Ricci* implies that such an answer might sometimes be sufficient to avoid Title VII's disparate treatment liability.

By finding the City of New Haven liable for disparate treatment, however, the Court assured potential disparate treatment plaintiffs that its strong-basis-in-evidence standard would not cause employers to fish for discriminatory flaws in their policies and practices to defend against such claims. The Court reviewed the record before it and found that the city's painstaking test development process belied its claims that the exams were not job-related and were inconsistent with the necessities of its fire department. In other words, the Court implicitly reasoned that an employer that implements policies and practices properly-cognizant of the risk of disparate impact liability, will precisely thereby bunker itself against disparate treatment — both from the inside and without. ♦

The Report Subscription Form (Volume 26, Numbers 1-4)

The publication of *The Illinois Public Employee Relations Report* reflects a continuing effort by Chicago-Kent College of Law and the Institute of Labor and Industrial Relations to provide education services to labor relations professionals in Illinois. *The Report* is available by subscription through Chicago-Kent College of Law at a rate of $40.00 per calendar year for four issues. To subscribe to *the IPER Report*, please complete this form and return it with a check or billing instructions to:

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Illinois Public Employee Relations Report . . .

Published quarterly by The Institute of Labor and Industrial Relations University of Illinois at Urbana-Champaign and Chicago-Kent College of Law llinois Institute of Technology, (ISSN 1559-9892), 565 West Adams Street, Chicago, Illinois 60661-3691.

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